In the Supreme Court of the United States.

DECEMBER TERM, 1868.

UNITED STATES, appellants,
vs.
STEAMER NINA SEMMES.
No. 35.

Appeal from the Circuit Court of the United States for the eastern district of Louisiana.

STATEMENT AND POINTS OF UNITED STATES.

This is the first of three cases of steamboats, libeled in the Circuit Court of the United States at New Orleans, under the confiscation act of August 6, 1861, which were argued at the last term, and which the court directed to be reargued at the present term.

The rule of decision must be the same in all the cases; and it is proposed, therefore, after a brief statement of the facts peculiar to the present case, to propound certain general propositions of law applicable to the common subject-matter of these cases, which it is contended, on the part of the Government, should induce the condemnation of the vessels.

1. The testimony in this case proves—

That Russell B. Roberts, the claimant, purchased the Nina Semmes in 1863. (Rec. p. 17.)

Previous to his purchase her owners had bored a hole in her and sunk her in Alabama bayou, on the Red river; and it appears that she was in the bayou when Roberts bought her. (Rec. p. 19.)

Boardman, the captain, says, "She was so concealed to prevent Captain Fuller, of the confederate navy, getting hold of her." (Rec. p. 18.)

Roberts, when he became the owner, took her out of the bayou; and she appears to have entered at once into the service of the confederate government, carrying corn and other articles from Shreveport to Alexandria and other places.

Soon after she came out of the bayou the rebel authorities again expressed an intention to make a gunboat out of her; when Captain Roberts ordered the master, Boardman, to conceal her again in Bayou Larto, and when that idea was abandoned, as the owner supposed, she came out. (Rec. p. 16.)

But the idea, it would seem, was not abandoned by the rebels, and they at once seized her and made her a tender for the Queen of the West, a rebel war vessel. (Rec. p. 14.)

Upon the termination of this impressment she renewed her employment in carrying munitions of war, commissary stores, quartermasters' stores, arms and troops, belonging to the confederate government; and this seems to have been her employment until 1865; when, after the surrender of the trans-Mississippi department by Kirby Smith, Roberts, the owner, returned to New Orleans. (Rec. pp. 18, 19.)

It is proved that Roberts received compensation, at the rate of five hundred dollars a day, for the use of the boat. (Rec. pp. 17, 19.)

2. The claimant alleges in his answer that "the said use and employment was brought about by *force* and *compulsion* on the part of the so-called confederate government." (Rec. p. 6.)

The only proof of this allegation which is submitted is the following:

That Capt. Roberts appeared to be in very bad humor to see his boat used by the confederate government. (Rec. p. 19.)

The further statement of the witness, in the same connexion, explains the reason of this "bad humor." He says, "the absence of docks and other conveniences for repairing boats in the confederacy caused them to be injured very rapidly when in use," etc. (Rec. p. 19.)

Boardman says, "there was no mode of avoiding the boats being used by the Confederate authorities; if refused some one would have been put on board of her, and the boat taken possession of." (Rec. p. 17.)

But it is nowhere shown:

(a) That the claimant made any effort to leave the rebel region with his boat; nor is there reason to believe, from the evidence, that such an effort would have been unsuccessful. New Orleans was in our possession. It is not explained why she did not escape there.

All vessels running in those waters were, of course, liable to be employed by the rebel government. All the business on those rivers was done by the government.

It was the duty of the claimant, if he sincerely desired to avoid the public service, to place his boat, if possible, beyond rebel control, by carrying her into a loyal region. We see that he remained within the

rebel lines until the surrender of Kirby Smith, and then, for the first time, returned to New Orleans.

(b) Nor is it shown that Roberts ever refused to carry confederate property; or that any resistance was offered to the rebel authorities, in order to avoid the employment; or that any force was exerted, or required to be exerted, by those authorities, upon the vessel, or upon any person connected with her, in order to obtain the required service.

The only evidence showing an effort or active desire, on the part of Roberts, to avoid putting the vessel under the control of the rebel authorities, relates to the occasion when it was intended to convert her into a gunboat. This project was not favored by Roberts, and he concealed her in the swamp. As soon as he supposed the plan had been abandoned, he brought his vessel out. It appears that she was afterwards seized, and used, for a time, as a tender to a man-of-war. And as soon as she was released from this impressment, Roberts obtained employment for her as a transport in the confederate service, and received regularly his pay for that employment, until the rebellion ended.

3. The bare fact, however, as testified to by the witnesses, that Roberts purchased her in 1863, while she was lying in one of the swamps, and, at once put her upon the river, controlled as it was by the rebel authorities, naval and military, for general employment, shows conclusively, that the service for which she is now libelled was not at all, as is pretended, compulsory. Roberts bought her, undoubtedly, to make money out of her; and, as there was little or no employment except government employment to be obtained for vessels on the river at that period, he doubtless expected, believed and hoped that he would make money in the service of the confederacy.

This is the whole of the case.

FIRST POINT.

The statute of August 6, 1861, inflicts the confiscation of property, used in contravention of the statute, as a penalty for an offence against the United States.

This point is directly adjudicated by the decision of the court in the case of ARMSTRONG'S FOUNDRY. (6 Wall, 769.)

The Chief Justice said in that case:

"We think it clear that the statute regarded the consent of the owner to the employment of his property in aid of the rebellion as an offence, and inflicted forfeiture as a penalty."

SECOND POINT.

The rule of decision which prevails in cases of treason, where the defence is compulsion, should prevail in regard to the like defence, in cases under the act of August 6, 1861.

This is sufficiently obvious without further comment.

THIRD POINT.

That rule, as determined by repeated adjudications, in England and in this country, is, that unless actual force was exercised against the party personally, or threats and intimidation placed him personally under a reasonable fear of death or serious bodily harm, the allegation of compulsion cannot be sustained.

OLDCASTLE'S CASE, 1 HALE, P. C. 70.

In that case those who were charged as the accomplices of Sir John Oldcastle in rebellon were

Previous to his purchase her owners had bored a hole in her and sunk her in Alabama bayou, on the Red river; and it appears that she was in the bayou when Roberts bought her. (Rec. p. 19.)

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OLDCASTLE'S CASE, 1 HALE, P. C. 70.

In that case those who were charged as the accomplices of Sir John Oldcastle in rebellon were

acquitted, because it was found to be done *pro timore mortis, et quod recesserunt, quam cito potuerunt.*

M'GROWTHER'S CASE, 1 EAST, P. C. 71.

In that case it was ruled that an apprehension, though ever so well founded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person of the party, will be no excuse for joining or continuing with rebels.

M'CARTY'S CASE, 2 DALL., 86; VIGOL'S CASE, IBID., 347.

In these cases Chief Justice McKean and Mr. Justice Patterson laid down the rule nearly in the same words, the former saying, "It must be remembered that, in the eye of the law, nothing will excuse the act of joining an enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property."

SMITH'S CASE, (UNITED STATES CIRCUIT COURT, PHIL'A, 1861.)

In this case, which was an indictment for piracy, the counsel for the defence offered to prove that all able-bodied men in Georgia were required by law to render military service or leave the country, but the court excluded the evidence, "unless it was proposed to prove some fact of compulsion exercised as to the defendant in particular, or as to the crew, of which he was one."

And in charging the jury the court said:

"The mere fact, if it were proved, that by an act of legislation of the revolutionary government, under whose power the defendant resided, military or naval service was required of every such resident, under pain of banishment or confiscation of property, would

be no excuse or justification. Unless actual force was exercised against him personally, or threats and intimidation placed him personally under a reasonable fear of death, or serious bodily harm, the allegation of compulsion cannot be sustained."

SMITH'S TRIAL FOR PIRACY, 1861, P. 99.

This is the most recent case on the subject, and the learned judges of the Circuit Court adopted the English decisions on the subject of compulsion mentioned in *Hale* and *East*, in their full length and breadth.

FOURTH POINT.

The necessity must be proved by clear and conclusive evidence.

JOSEFA SEGUNDA, 5 WH , 338.

Mr. Justice Story there said:

"When any act is done, which of itself, and unexplained, is a violation of law, and a party to extricate himself or his property from the consequences of it resorts to the plea of necessity or distress, the burden of proof is not only thrown upon him, but when the temptation to infringe the law is great, and the alleged necessity, if real, can be fully and easily established, no court should be satisfied with anything short of the most *convincing and conclusive testimony*."

FIFTH POINT.

The spirit of the observation of Lord Stowell, in deciding a case under the revenue laws, should guide the judicial administration of the statute under which this proceeding is brought.

In the case of the Generous, (2 Dodson, 323,) Lord Stowell said:

"It is a case under the revenue laws; a system, as it has been truly observed, of a very unbending nature, framed for the protection of great interests, and upon very jealous views of preventive policy, and this policy is to attend it in its actual administration. It is not the private opinion of the judge upon the policy that is to guide his judgment; he must follow where the law leads, in a general unbending course."

SIXTH POINT.

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BRIEF.

As to the matter of pardon and amnesty pleaded in the case of the Nina Semmes and the General Beauregard steamers.

In the cases of the "Nina Semmes" and the "General Beauregard," the counsel have filed pleas setting up pardon and amnesty. These pleas are unsupported by any proof, save to call on the court to take judicial notice of the proclamation of the President, of July 4, 1868.

If this proclamation is effective in these cases, it must be in all the others of like claim of forfeiture, when properly pleaded, and the necessary facts to sustain it proved. So that it would seem best, at first, to examine an answer so potent and universal.

The first criticism in point of form and effect of the pleas as presented is, that there is no evidence that the claimants are not within its exceptions, so that the proclamation is operative as to them.

The claimant's own oath that he is not, is not suffieient evidence.

The Grey Jacket, 5 Wallace, 342, 367.

But, as in the other cases, this defect of proof may be remedied; a further and broader answer must be suggested.

The plea of pardon and amnesty is supported by the proclamation only; as a plea of *pardon* alone, it cannot be sustained except by deed delivered, and accepted, and proferred in court.

Wilson's Case, 7 Peters, 150.

That case declares a pardon is the private, but official, act of the Executive, granted by deed, which must be pleaded

with *profert in curia*, as any deed of release may be, of which judicial notice cannot be taken.

Such pardon only was within the constitutional province of the Executive to grant; its significant classification with reprieves is conclusive upon this proposition.

Amnesty, from the Greek αμνηστια, (oblivion,) is a solemn legislative act of grace for political offences of classes of persons, and may be authorized to be proclaimed by the Executive, of which all courts must take notice.

By the act of 17th of July, 1862, (sec. 13, 12 Stats. at Large, p. 592,) it is enacted: "That the President may, by *proclamation*, extend to persons who may have participated in the existing rebellion pardon and amnesty, with such exceptions," &c.

Under this legislative authority, Presidents Lincoln and Johnson made several proclamations of pardon and amnesty.

It is believed that no proclamation of pardon and amnesty in a constitutional government has ever been made without legislative sanction.

The most striking examples of acts of amnesty are those granted on the restoration of Charles II, with its exception of the regicides by name; that granted on the second restoration of the Bourbons in 1816, which excepted the regicides and some others; and the law of amnesty for political offences in France in 1836.

By act passed January 21, 1867, (14 Stats. at Large, p. 377,) the 13th sec. of the act of July 17, 1862, is repealed.

The act of repeal was not signed by the President, but went into operation from lapse of time without return.

It is to be presumed, therefore, that this act was overlooked by the President, as he issued a general proclamation of pardon and amnesty on the 4th of July, 1868, after Congress had expressly taken away the power so to do, which is the proclamation relied on at bar.

The objections to holding valid such a general proclamation are obvious. If it has the effect of a constitutional pardon by deed by the President of the individual, it repeals all confiscation laws and acts of disability.

It reverses all decrees of the courts involving such cases, which stand on appeal because of other questions.

If the proclamation has the effect given to a pardon by deed, by this court in *Ex parte* Garland, (4th Wallace 390,) and in the Armstrong Foundry Case, (5th Wallace;) and specially if it has the effect claimed for it by the learned counsel, (which may be the true one,) that after an act of amnesty [oblivion] no court can hear an averment against the status of a suitor, as to his disability for disloyalty or treason, that he has be-become *novus et legalis homo*, it is difficult to see why he may not sue in the Court of Claims, notwithstanding statute disabilities, as the constitutional pardon must be superior to any law of Congress controlling its legitimate effect.

Again, as there are no reservations as to rights of property or persons in this proclamation, its claimed effect may be to unsettle many private rights and relations, which hardly could have been comtemplated by the Executive, as in case of the informant at bar.

It also does, in gross, what has never been done in the restorations made by special pardons or remissions, wherein they have always been excepted, *i. e.*, throws all the costs of these proceedings upon the United States.

It would be easy to imagine other cases of the greatest hardship from giving the proposed effect to this proclamation.

But what is its effect, taken as a pardon, in cases at bar, upon the informer's share of the forfeitures?

This question was specially left undecided by the court in the case of Armstrong's Foundry—*ubi supra*—although argued by counsel.

It has been held as a general rule, that the "Crown share" only of a forfeiture can be remitted by the pardon.

Comyn's Dig., F., title Pardon, vol. 5, p. 234.
4 Blackstone's Com., 309.
2 Hawkins, 392.

So of a penalty on conviction for deer-stalking, for it is a forfeiture to the party aggrieved.

Comyn's Dig., vol. 5, p. 233.

A pardon does not affect the second marriage of the wife of a person sentenced to the State prison for life, nor the sale of his property by a person appointed to administer his estate.

In re. Deming, 10 Johns., 232, 483.

A pardon may prevent a penal action before suit brought.

Bac. Abrid., 5 vol., 406, *voce*, Pardon B.

A pardon cannot divest an individual of a fine, or part thereof, because a vested right.

In re. Flournoy, 1 Georgia (State) Rep., 606.

The same point was decided, (4 Wash. C. C. Rep., 64,) United States vs. Lancaster, "after conviction."

It was so said by the court in *Ex parte* Garland, in giving the opinion (*obiter*) "after conviction."

Also, in State vs. Simpson, (1 Bailey So. Ca. Rep., 378.)

There is a class of cases which would seem to be in conflict with those above cited.

The question appears to turn on the point whether the rights of the informer are or are not vested in him before the grant of the pardon, if they are not excepted in it.

The courts have adopted various facts as evidence of such vestiture of right. Sometimes commencement of suit; sometimes conviction or condemnation of the *res* only; sometimes holding the condemnation insufficient, they have held there must be distribution of the proceeds to give indefeasible title, as in prize cases, both in this country and England, because prizes were the gift of the Crown.

The true distinction, deduced from all the cases, which would seem to reconcile them, is: Was any interest created or given to the informer by the statute in the *res* itself, or only a share of the proceeds distributed as a reward, after conviction or condemnation. In the first case his interest is held indefeasible, in the second, liable to be divested.

It will be observed, by the very peculiar phraseology of the statute of August 6, 1861, that an interest is at first created in the informer.

By sec. 1. "The property" is to be "seized, confiscated, and condemned."

Sec. 2. "The proceedings of condemnation" may be instituted by the Attorney General, &c., in which case "they shall be wholly for the benefit of the United States; or any person may file an information, in which case the *proceedings* shall be for the use of such informer and the United States in equal parts."

Thus it will be perceived that a joint interest is given to the informer with the United States in the property "seized, confiscated," and to be condemned. How can that be divested by the act of the United States alone through its Executive?

BENJ. F. BUTLER,
Of Counsel.